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Part I

Evicting Heirs, Devisees & Legatees

Where Does Jurisdiction Lie?

I. INTRODUCTION

Eviction! A powerful term, whose threat strikes fear in the tenant who has fallen behind on their payments to the landlord. A term, and the application of which, disparages the financial reputation of the one evicted. But what if the one being evicted is a decedent's spouse, a will beneficiary, or an heir under Texas intestacy laws. Should they too fear being removed from their home as a result of nothing more than a loved ones demise? I suggest that they should not!

This article will examine what effect the Probate Code and relevant case law have on eviction suits involving heirs, devisees and legatees and how a Justice Court, or a party to an eviction suit, can resolve jurisdictional issues attending the eviction suit.

II. EVICTION SUITS

The forcible entry and detainer action was created by the Texas Legislature to provide a speedy and inexpensive remedy for the determination of who is entitled to *possession* of property.<sup>1</sup> A suit to try title in a district court would also accomplish the same result, i.e. determining the rightful owner of the property and thus the person who has the right to possess the property.<sup>2</sup> The Texas Legislature, however, has provided a streamlined process for the trial of an eviction suit so as to avoid the unnecessary litigation costs, time and expenses that would occur if a property owner's only recourse was a suit to try title.<sup>3</sup> Thus, to preserve the simplicity and speedy nature of this remedy, resolution of a title question between the parties is not permitted in an eviction suit.<sup>4</sup> If the justice court goes beyond its jurisdiction and does try title, the judgment is void.<sup>5</sup> However, a mere allegation that the case involves a

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<sup>1</sup> *Dormandy v. Dinero Land & Cattle Co.*, 61 S.W.3d 555, 557 (Tex. App.--San Antonio 2001, pet. dismissed w.o.j.).

<sup>2</sup> *See Rice v. Pinney*, 51 S.W.3d 705, 709-11 (Tex. App.---Dallas 2001, no pet.)(discussing the cumulative nature of a forcible detainer action and a suit in the district court to determine the question of title); *McCloud v. Knapp*, 507 S.W.2d 644, 647-48 (Tex. App.—Dallas 1974, no writ)(holding that a district court in a trespass to try title action has concurrent jurisdiction with the justice of the peace court to determine the question of possession).

<sup>3</sup> *See Dormandy*, 61 S.W.3d at 559; *Rice*, 51 S.W.3d 709.

<sup>4</sup> TEX. R. CIV. P. 746; *Rice*, 51 S.W. 3d at 709.

<sup>5</sup> *Johnson v. Fellowship Baptist Church*, 627 S.W.2d 203, 204 (Tex. App.—Corpus Christi 1981,no writ).

title dispute is not sufficient to dispossess the justice court of jurisdiction. More is required. The central question then becomes whether or not the justice court can determine which party has the right to immediate possession of the property without inquiring into the title dispute. The justice court can proceed on the possession issue if it can decide the right of possession without having to make a determination regarding superior title.<sup>6</sup> In eviction suits involving a typical landlord-tenant relationship, e.g. renting an apartment, the question of title is often irrelevant. Eviction suits become more problematic when the typical landlord-tenant relationship does not exist. For example, eviction suits based on a deed of trust securing a vendor's lien note, often involve an allegation of disputed title. Recently, two courts of appeals have held that these types of cases do not require the justice courts to examine title to make a determination of the right to possession.<sup>7</sup> The justice court merely has to examine the deed of trust to determine if the defendant became a tenant at sufferance of a purchaser through a foreclosure sale. If so, the defendant's failure to surrender possession of the property to the purchaser will subject him to an eviction suit. Any issue of title raised by the defendant should be instituted in a district court and may be litigated concurrently with the eviction suit.<sup>8</sup>

Justice courts should be wary of fact scenarios that involve a personal representative of an estate, or persons claiming a right of possession to property by way of inheritance under a will or intestate succession. These cases will almost always require trying title to determine who has the superior right of possession.<sup>9</sup>

### III. PROBATE ISSUES AND THE EVICTION REMEDY

#### A. Eviction Suits Involving A Personal Representative

A number of fact scenarios can give rise to a personal representative of an estate as a party to an eviction suit. For example, the decedent was leasing office space prior to his death and the personal representative discontinued making lease payments and refuses to relinquish possession of the

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<sup>6</sup> See *Aguilar v. Weber*, 2002 Tex. App. Lexis 1684, \*1 at \*5 (Tex. App.—Waco, March 6, 2002, no pet. h.); *Rice v. Pinney*, 51 S.W.3d at 713.

<sup>7</sup> See generally *Dormandy*, 61 S.W.3d 555 (holding that the right of immediate possession had been properly established in the justice and county courts, and the ultimate question of title could be determined in the district court); *Rice*, 51 S.W.3d 705 (holding that the county court at law was not required to determine the issue of title to resolve the right to immediate possession).

<sup>8</sup> *Dormandy*, 61 S.W.3d at 558-59; *Rice*, 51 S.W.3d at 709.

<sup>9</sup> See *Dormandy*, 61 S.W.3d 559 (holding that certain types of cases preclude forcible detainer actions in justice court because of interconnected title and possession cases); *Gentry v. Marburger*, 596 S.W.2d 201, 203 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.)(holding that title directly involved in possession issue when possession based on assertion of life estate); *Dent v. Pines*, 394 S.W.2d 26, 268-69 (Tex. Civ. App.—Houston [1st Dist.] 1965, no writ)(holding that title directly involved in possession issue when possession required determination of claims under competing wills and intestacy statutes).

leasehold. The landlord could bring an eviction suit in justice court against the personal representative seeking repossession of the space. This scenario would not involve a title dispute and jurisdiction is proper in the justice court.<sup>10</sup> Similarly, the decedent may have owned rental property and a tenant has stopped paying rent. The personal representative could go to justice court and seek the tenant's eviction. Here too an examination of title is not required and the justice court would have jurisdiction to determine possession. However, suppose the decedent and a purported spouse lived together in a home and after his death, she refuses to vacate the premises on demand from the personal representative, e.g. the decedent's child from a prior marriage. Unlike the above examples, this situation requires the justice court to examine title in order to determine possession. The justice court would have to determine by what right the personal representative believes he is entitled to sole possession of the home; e.g. will, intestacy and, what right would allow the woman to remain in the home, e.g. homestead, testate and intestate rights.

In *Gentry v. Marburger*, Katie Marburger predeceased her husband, Leslie Marburger, leaving a will that left her community property to her three children by a former marriage subject to a life estate in the property to her husband.<sup>11</sup> After Katie's death, Leslie Marburger married Margaret Marburger.<sup>12</sup> Over the course of this marriage, Leslie and Margaret resided in the home.<sup>13</sup> The couple divorced, remarried, and were in the process of obtaining another divorce when Leslie died.<sup>14</sup> Prior to Leslie's death, an eviction suit was successfully brought in justice court seeking Margaret's removal from the home.<sup>15</sup> Subsequently, Leslie died thereby terminating his life estate in the property.<sup>16</sup> Margaret obtained a temporary injunction in district court enjoining the independent executrix and a beneficiary under Leslie's will, from interfering with her possession of the home.<sup>17</sup> The executrix appealed asserting that the district court was without authority to enjoin the justice court from enforcing its writ of possession.<sup>18</sup> The court of appeals held that the pleadings in the justice court raised two indicia of title in Margaret; one, the right to occupy the premises through the life tenancy of her husband and two, adverse possession.<sup>19</sup> The Court determined that "the justice court had no

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<sup>10</sup> See generally *Chapman v. Southern Hospitalities, Inc.*, 624 S.W.2d 320 (Tex. Civ. App.—Tyler 1981, no writ)(appeal of forcible entry and detainer action involving the failure to pay rent under a lease contract by a temporary administrator of an estate).

<sup>11</sup> *Gentry v. Marburger*, 596 S.W.2d 201, 202 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 203.

jurisdiction of the suit because title to the premises was directly involved.”<sup>20</sup> The appellate court also discussed the issue of Margaret’s homestead rights in the property.

“[Margaret] was married to Leslie Marburger at the time the justice court suit was filed and tried. He was the community survivor of his marriage with Katie Marburger and the disputed premises constituted their homestead. After her death he married Margaret and they lived in the homestead. Thus [Margaret’s] homestead right to possession became vested.

The share that passes to the heirs or devisees . . . is subject to the surviving spouse’s homestead rights. If the surviving spouse remarries, the homestead of the second marriage may exist in the same property and the heirs of the deceased spouse of the first marriage are not entitled to demand their interest in the premises at the time of the second marriage. If the spouse who survived the first marriage dies leaving a surviving spouse, the surviving spouse of the second marriage is entitled to a homestead in the portion of his or her deceased spouse’s portion of the community property of the first marriage. In this circumstance, the surviving spouse of the second marriage will be entitled to a homestead in a one-half undivided interest in the whole and will be a tenant in common with the heirs or devisees of the spouse of the first marriage who was first deceased.”<sup>21</sup>

A justice court confronted with facts similar to those found in the *Marburger* case should proceed with caution. The following questions will assist a justice of the peace in determining whether they have jurisdiction over an eviction suit when a personal representative is a party or the property is subject to an estate:

- 1) Who is the person seeking the eviction? Are they a personal representative, a beneficiary under a will or an heir?
- 2) Who are they trying to evict? Is the person in possession a surviving spouse, a decedent’s minor child who resides in the home, a will beneficiary or an heir under the laws of intestate succession?
- 3) Is there an estate pending in a probate court or county court at law?
- 4) If the person seeking the eviction is claiming a right of possession as a beneficiary under a will, has the will been admitted to probate?

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<sup>20</sup> *Id.*

<sup>21</sup> *Gentry*, 596 S.W.2d at 203-04.

- 5) If the person seeking the eviction is claiming a right of possession as an heir, has there been a judicial determination of heirship or a statutory heirship affidavit filed?
- 6) Is the property, which is the subject of the eviction suit, a homestead?

Answers to these questions which establish that the person being evicted is the decedent's surviving spouse or minor child; that the property involved is a homestead; or that the defendant is a will beneficiary or an heir strongly suggest that the justice court is without jurisdiction to determine the right of possession. What then should the justice court do?

#### B. Alternatives To A Dismissal For Lack of Subject Matter Jurisdiction

If a justice court determines that an eviction suit involving probate issues that interconnect title and possession issues cannot be brought therein, the court must dismiss the suit for lack of jurisdiction.<sup>22</sup> What then are the options available to the litigants.

##### 1. Appeal To The County Court At Law Or Statutory Probate Court.

A plaintiff in an eviction suit, which has been dismissed for lack of jurisdiction, can appeal to the county court at law for a trial de novo.<sup>23</sup> This appeal can be to a statutory probate court if there is a pending estate.<sup>24</sup> Regardless of which court hears the appeal, the appellate jurisdiction of the court is confined to the jurisdictional limits of the justice court, and the court has no jurisdiction over an appeal unless the justice court had jurisdiction.<sup>25</sup> Therefore, since a justice court is expressly denied jurisdiction to adjudicate title to land, both the county court at law and the statutory probate court have no jurisdiction to adjudicate title in a de novo trial.<sup>26</sup> Thus, the only issue before the court is whether the right of possession can be determined without adjudicating the superior right to title between the litigants. If the answer is "no", the court lacks subject matter jurisdiction over the appeal and must dismiss the case.

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<sup>22</sup> See *Aguilar*, 2002 Tex. App. Lexis 1684, \*1 at \*4-\*5; *Dormandy*, 61 S.W.3d at 557-58; *Rice*, 51 S.W.3d at 709.

<sup>23</sup> See Tex. Prop. Code Ann. § 24.004(Vernon 2000); see *Home Sav. Ass'n v. Ramirez*, 600 S.W.2d 911, 913 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.).

<sup>24</sup> See *Chapman*, 624 S.W.2d at 322 (holding that a statutory probate court has concurrent jurisdiction with the county court to hear an appeal of a forcible entry and detainer action).

<sup>25</sup> *Aguilar*, 2002 Tex. App. Lexis 1684, \*1 at \*3; *Rice*, 51 S.W.3d at 708; *Crumpton v. Stevens*, 936 S.W.2d 473, 476 (Tex. App.—Fort Worth 1996, no writ); *Goggins v. Leo*, 849 S.W.2d 373, 375 (Tex. App.—Houston [14th Dist.] 1993, no writ).

<sup>26</sup> *Aguilar*, 2002 Tex. App. Lexis 1684, \*1 at \*3-\*4; *Rice*, 51 S.W.3d at 708-09.

## 2. Institute A Suit To Try Title.

A plaintiff in an eviction suit, which has been dismissed for lack of subject matter jurisdiction, can institute a suit to try title in either the district court or a court exercising probate jurisdiction.<sup>27</sup> Generally, suits to try title must be filed in district court.<sup>28</sup> If, however, an estate is pending in a probate court or a county court at law, the plaintiff in the eviction suit may file a suit to try title in the court where the estate is pending.<sup>29</sup>

Texas Probate Code section 5(e) provides that “[a] statutory probate court has concurrent jurisdiction with the district court in all actions by or against a person in the person’s capacity as a personal representative . . . .”<sup>30</sup> Moreover, “[a]ll courts exercising original probate jurisdiction shall have the power to hear all matters incident to an estate.”<sup>31</sup> “Incident to an estate” includes all actions of trial of title to land.<sup>32</sup>

## 3. File A TPC §5B Transfer Motion.

If there is a pending estate in a probate court, can the judge of the probate court simply transfer to itself the eviction suit from the justice court under section 5B? Currently, no cases have addressed this issue.

TPC §5B provides: “A judge of a statutory probate court, on the motion of a party to the action or on the motion of a person interested in an estate, may transfer to his court from a district, county, or statutory court a cause of action appertaining to or incident to an estate pending in the statutory probate court or a cause of action which a personal representative of an estate pending in the statutory probate court is a party . . . .”<sup>33</sup> Moreover, section 5A(b) tells us that appertaining to or incident to an estate pending in a statutory probate court includes “all actions for trial of the right of property.”<sup>34</sup> Reading section 5B and 5A(b) together, the language seems broad enough to accomplish a transfer of an eviction suit in justice court to a statutory probate court. The

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<sup>27</sup> See *Aguilar*, 2002 Tex. App. Lexis 1684, \*1 at \*3-\*4; *Dormandy*, 61 S.W.3d at 558-59; *Rice*, 51 S.W.3d at 709; *McCloud*, 507 S.W.2d at 647-48.

<sup>28</sup> Tex. Const. art. V § 8.

<sup>29</sup> See *Marburger*, 596 S.W.2d at 5.

<sup>30</sup> Tex. Prob. Code § 5(e) (Vernon Supp. 2002).

<sup>31</sup> *Id.* at § 5(f) (Vernon Supp. 2002).

<sup>32</sup> *Id.* at § 5A (Vernon Supp. 2002).

<sup>33</sup> Tex. Prob. Code Ann. § 5B (Vernon Supp. 2002).

<sup>34</sup> *Id.* at § 5A(b) (Vernon Supp. 2002).



problem arises, however, when one considers the jurisdiction of the justice courts.

As previously mentioned, a justice court only has jurisdiction to determine possession.<sup>35</sup> If the issues of title and possession are so intertwined to make a determination of possession impossible without first determining the relative rights of the parties to title, then the justice court lacks subject matter jurisdiction over the eviction suit.<sup>36</sup> Therefore, if the justice court lacks subject matter jurisdiction over the suit, it lacks jurisdiction over the suit for all purposes. Hence, the justice court would lack the necessary authority to comply with the probate court's order transferring the case. However, assume the justice court erroneously transfers the suit. The error can be quickly cured.

In *Tanner v. Axelrad*, the court of appeals was asked to consider whether a transfer from Harris County Precinct One (1) Justice Court to Harris County Precinct Five (5) Justice Court was proper given the fact that Precinct One (1) Justice Court did not have jurisdiction.<sup>37</sup> The court of appeals avoided addressing the propriety of the transfer on the grounds that the Precinct Five (5) Justice Court acquired jurisdiction when an amended petition was filed in that court following the transfer.<sup>38</sup> The court of appeals reasoned that had the Precinct One (1) Justice Court merely dismissed the eviction suit for having been filed in the wrong precinct, the plaintiff could have re-filed the action with the Precinct Five (5) Justice Court.<sup>39</sup> Similarly, should the justice court be without jurisdiction to transfer the eviction suit, the probate court would acquire jurisdiction simply by the filing of an amended petition raising allegations necessary for a suit to try title.<sup>40</sup>

#### 4. File A Turnover Motion.

An alternative to an eviction suit, if there is a pending estate, is to seek an order from the probate court requiring the person or persons who are in possession of estate property to turnover

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<sup>35</sup> Tex. R. Civ. P. 746; *Dormandy*, 61 S.W.3d at 557.

<sup>36</sup> *Dormandy*, 61 S.W.3d at 557-58.

<sup>37</sup> *Tanner v. Axelrad*, 680 S.W.2d 851, 852-53 (Tex. App.—Houston [1st Dist.] 1984, no writ).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 853.

<sup>40</sup> *Id.*

possession of the property to the personal representative of the estate, i.e. the executor or administrator.<sup>41</sup>

TPC §230, mandates that “[t]he personal representative of an estate, immediately after receiving letters, shall collect and take into possession the personal property, record books, title papers, and other business papers of the estate.”<sup>42</sup> Additionally, TPC §233 provides that “[e]very personal representative of an estate shall use ordinary diligence to collect all claims and debts due the estate and to recover possession of all property of the estate to which its owners have claim or title. . . .”<sup>43</sup>

### C. When Injunctive Relief Is Available?

When a justice court in an eviction suit exceeds its jurisdiction and tries title, the judgment is void and a district court, or a court exercising probate jurisdiction, upon proper application, should enjoin its enforcement.<sup>44</sup> Injunctions on writs of possession have been upheld in the following situations: 1) when the right to possession depended upon compliance with a sales contract;<sup>45</sup> 2) when the right to possession is based on an assertion of a life estate;<sup>46</sup> and 3) when a right to possession is based on a will.<sup>47</sup>

In *Dent v. Pines*, the appellate court determined the propriety of a permanent injunction enjoining Ethel T. Dent, executrix, as the successful plaintiff in an eviction suit, from interfering with Milton Pines’ possession and enjoyment of certain real property. The property in question was a two-story house divided into two apartments.<sup>48</sup> One of these apartments was occupied by Milton Pines.<sup>49</sup> His uncle, wife and their child occupied

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<sup>41</sup> See generally *Allard v. Frech*, 735 S.W.2d 311, 319 (Tex. App.—Fort Worth 1987, aff’d, 754 sw2d 111)(holding that a probate court had authority to require the turnover of estate property in order to preserve the property).

<sup>42</sup> Tex. Prob. Code Ann. § 230 (Vernon Supp. 2002).

<sup>43</sup> *Id.* at § 233.

<sup>44</sup> *Johnson v. Fellowship Baptist Church*, 627 S.W.2d 203, 204 (Tex. App.—Corpus Christi 1981, no writ); *Home Sav. Ass’n*, 600 S.W.2d at 913-14 (holding that a district court has no authority to issue an injunction restraining the enforcement of a judgment of a justice court if that judgment solely resolves who is entitled to immediate possession); *Marburger*, 596 S.W.2d at 204 (upholding the enjoinder of an order of a justice court evicting a surviving spouse); *Dent*, 394 S.W.2d at 269 (upholding the enjoinder of an order of a justice court when the right of possession arose from an individual’s status as a beneficiary under a will).

<sup>45</sup> *Guyer v. Rose*, 601 S.W.2d 205, 205-06 (Tex. Civ. App.—Dallas 1980, writ ref’d n.r.e.).

<sup>46</sup> *Gentry*, 596 S.W.2d at 203.

<sup>47</sup> *Dent*, 394 S.W.2d at 268-69.

<sup>48</sup> *Id.* at 267-68.

<sup>49</sup> *Id.* at 268.

the other apartment. Milton Pines continued to reside on the premises after the death of his uncle.<sup>50</sup>

The court of appeals held that the county court at law reviewing a de-novo appeal actually determined “that the title to the premises in controversy, under the evidence presented, was clearly in [Ethel Dent] and that, therefore, [Milton Pines] had no right to remain in possession.”<sup>51</sup> “The County Court had no jurisdiction of the cause since title to real estate was necessarily involved” and the issuance of an injunction was proper.<sup>52</sup>

The appellate court further noted two rules axiomatic to a forcible entry and detainer action. First, the action is dependent on proof of a landlord tenant relationship. Second, constructive possession will not support the action because it necessarily involves an inquiry as to title.

#### IV. CONCLUSION

The Texas Legislature has established a quick and efficient method of resolving the right to immediate possession of realty through the forcible entry and detainer action. The streamlined nature of the process, however, provides an avenue for unscrupulous litigants to obtain possession of realty when the justice court overlooks the issue of title in determining possession. Accordingly, a justice court that encounters an eviction suit involving an estate should thoroughly question the parties to assure itself that a determination of title is not required.

The following flow chart summarizes the options available to the justice court if it determines that the issues of title and possession are so intertwined as to deprive it of jurisdiction:

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<sup>50</sup> *Id.* at 269

<sup>51</sup> *Dent*, 394 S.W.2d at 269.

<sup>52</sup> *Id.*

